United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of Mailing

75-2007

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2007

WILLIAM BREWINGTON,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RICHARD W. BREWSTER,
Assistant United States Attorneys,
Of Counsel.

2

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2007

WILLIAM BREWINGTON,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant William Brewington appeals from an order of the United States District Court for the Eastern District of New York (Judd, *J.*) entered on July 30, 1974 denying his motion pursuant to Title 28, United States Code, Section 2255 to vacate his sentence and set aside the judgment of conviction. On June 25, 1973, appellant had entered a plea of guilty to one count of an indictment, which count charged him with conspiracy to distribute cocaine in violation of Title 21, United States Code, Section 846.* On September 14, 1973, appellant was sentenced to a term of six years in prison plus a fine of $10,000 and a special parole term of ten years, the prison term to run concurrently with a sentence imposed in the Southern District of New York on a separate narcotics offense. After sentencing was imposed,

* Appellant's brief incorrectly indicates that appellant pleaded guilty to a charge under Section 841.

the remaining count of the indictment was dismissed as to appellant. Appellant is incarcerated.

On this appeal appellant bases his attack on the District Court's denial of his motion on Rule 11 of the Federal Rules of Criminal Procedure, because at the time of his plea the Court failed personally to advise him that a special parole term would be imposed if he were sentenced to a term of imprisonment.

Statement of the Case

A. Indictment and plea.

On March 22, 1973, appellant and three other defendants were named in a two-count indictment charging both possession of (count one) and conspiracy to possess (count two) approximately 899.3 grams of cocaine (73 Cr. 303; E.D. N.Y.). The case was assigned to District Judge Judd. On March 29, 1973 appellant pleaded not guilty.

On June 25, 1973, appellant and another defendant, Eddie Long, each withdrew their previously entered pleas of not guilty and pleaded guilty to the conspiracy count.* Both Long and appellant were represented by Jeffrey C. Hoffman, who noted at the outset that both defendants wished to withdraw their not guilty pleas and enter guilty pleas to the conspiracy count (A-3). First, Judge Judd addressed a series of standard Rule 11 questions to Eddie Long (A-3 through A-10) and specifically noted that

> "The penalty for violation of Section 846 is a term of imprisonment of not more than 15 years; a fine of not more than $25,000 or both. A special parole term of at least 3 years, in addition, if a term of imprisonment is imposed." (A-6)

---

* The entire minutes of the plea have been reproduced in the Government's Appendix beginning at page A-1.

Judge Judd also pointed out that

> "I don't regard narcotics sales by non-addicts as a light offense. My practice, almost uniformly, has been to impose a substantial jail sentence." (A-7)

Immediately after accepting Eddie Long's plea and discussing his pre-surrender bail arrangements, Judge Judd turned to appellant (A-12). Following a brief discussion of appellant's educational background, appellant indicated that he was satisfied with his lawyer (A-13). Rather than repeat each of the points addressed to Eddie Long only minutes before * in appellant's presence, Judge Judd then referred to his colloquy with Long:

> "The Court: Now you've heard what I said about the indictment. You're charged as part of the same conspiracy; you understand that?
>
> Defendant Brewington: Yes." (A-14)

The Government then took the unusual step of recommending a specific sentence (six years) to the Court (A-15). In that connection Judge Judd asked the appellant the following question:

> "The Court: Although the Government has recommended a six-year sentence, do you understand that it's up to me to decide within the limits imposed by the statute?
>
> Defendant Brewington: Yes, sir." (A-17, A-18)

After Judge Judd questioned appellant as to the factual basis for his plea (A-18, A-19), appellant's counsel indicated that there was no reason why the plea should not be accepted (A-19) and the plea was accepted by the Court (A-20). At no point in his interchange with appellant did

---

* Six pages of transcript separate Judge Judd's statement to Long concerning the mandatory special parole term and the beginning of his questioning of appellant.

Judge Judd repeat his statements to Long concerning the applicable maximum prison term, fine or special parole term.

On July 25, 1973, appellant was sentenced by Judge Bonsal in the Southern District of New York to 10 years imprisonment for each count of his conviction under Title 21, Section 841, the sentences to run concurrently. In addition, appellant received a special parole term of six years to follow his release from prison.

On September 14, 1973, appellant was sentenced by Judge Judd to six years imprisonment, to run concurrently with the Southern District sentence, plus a ten-year special parole term following his release and a fine of $10,000.

B. Proceedings under the Writ.

On June 28, 1974, appellant filed a petition with the District Court under Title 18, United States Code, Section 2255, to vacate his sentence and set aside the judgment of conviction. In support of his petition appellant also filed an affidavit and a memorandum of law, each dated June 24, 1974.* Appellant's affidavit alleged, *inter alia,* that at the plea proceedings Judge Judd "failed to advise" appellant of the mandatory special parole term (A-24). In appellant's supporting memorandum of law he also noted the failure by Judge Judd to inform appellant *"directly"* that the consequences of a guilty plea included the possibility of a 15 year maximum sentence, up to a $25,000 fine and a special parole term of at least three years (A-26). Appellant relied upon the case of *Bye* v. *United States,* 435 F.2d 177 (2d Cir. 1970).

On July 26, 1974, Judge Judd denied appellant's petition in the memorandum and order set forth in appellant's Appendix C and quoted in appellant's brief.

---

* Appellant's petition, supporting affidavit and memorandum are set forth in Government's Appendix beginning at page A-23.

ARGUMENT

This Circuit's recent decision holding that a defendant must be informed at the time of his plea of the existence of a mandatory special parole term should not be applied retroactively, at least to a case such as this, where appellant has failed to allege that he was in fact unaware of the mandatory special parole term and indeed where the record would not support such a contention.

Appellant's sole contention on appeal is that the failure of the District Court to make inquiry as to his understanding of the mandatory special parole term before taking his plea on June 25, 1973, necessitates a vacation of his plea and, therefore, a reversal of Judge Judd's order denying, without a hearing, appellant's Section 2255 petition. Citing *United States* v. *Michel*, — F.2d — (2d Cir. December 2, 1974), Slip. Opin. 433, and *McCarthy* v. *United States*, 394 U.S. 459 (1969), appellant argues that the mandatory special parole terms is a "consequence" of the guilty plea about which direct inquiry of appellant should have been made under Rule 11 before the plea was accepted.

Concededly, the portion of the pleading minutes relating to appellant's plea are devoid of any reference to the mandatory special parole term which was imposed upon him at time of sentencing. Although, the Government submits, there is ample evidence to support an inference that appellant actually knew the nature of the special parole term when he offered his plea,* the special parole term was clearly not the subject of comment or inquiry on the record after the taking of Eddie Long's plea. The legal significance of this failure on the part of the District Court is the only issue on this appeal.

On December 2, 1974, in *United States* v. *Michel, supra*, this Court held for the first time that the special parole

---

* *See infra* p. 9.

term imposed under Title 21, United States Code, Section 841(b)(1)(a) is a "direct consequence" of a guilty plea which falls within the mandate of Rule 11. Analogizing to *Bye* v. *United States*, 435 F.2d 177, 181 (2d Cir. 1970),* the Court noted that, since the special parole term "adds time to a regular sentence", Rule 11 requires that a defendant be advised by the Court that it will be imposed and that he "be asked by the Court if he understands that fact." Had the appellant pleaded guilty after *Michel*, it would have been incumbent upon the Court to inform the defendant of the special parole term and inquire as to his understanding thereof. Since appellant's plea was accepted on June 25, 1973, nearly a year and a half prior to *Michel*,** the question arises as to whether *Michel* will be given retroactive effect.***

Ample precedent exists on the question of the retroactivity of Rule 11 decisions. In *Korenfeld* v. *United States*, 451 F.2d 770 (2d Cir. 1971), this Circuit concluded

---

* In *Bye* this Court ruled that ineligibility for parole was a "consequence" of the plea within the ambit of Rule 11. Holding that the "purpose of Rule 11 was to insure that an accused is apprised of the significant effects of his plea" so that his decision might be an informed one, the Court noted that the unavailability of parole directly affects the time an accused will have to serve in prison.

** It should be noted that both *United States* v. *Richardson*, 483 F.2d 516 (8th Cir., decided August 17, 1973), and *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir., decided January 28, 1974), the only pre-*Michel* cases holding the special parole term to be a "consequence" under Rule 11, were decided after the date of acceptance of appellant's June 25, 1973 guilty plea. Accordingly, at the time Judge Judd accepted appellant's plea, there were no decisions within this Circuit or elsewhere requiring inquiry into the defendant's understanding of the special parole provisions of Sections 841 or 846.

*** The issue of whether *Michel* is to be treated as having retroactive application has already been presented to this Court in *Dexter Ferguson* v. *United States*, Docket No. 74-2569. *Ferguson* was argued on March 25, 1975. For the most part this brief duplicates the Government's brief in *Ferguson* on the issue of retroactivity.

that *Bye* v. *United States, supra,* upon which the *Michel* decision rested, was not to be applied retroactively. The rationale for the *Korenfeld* decision was the same as that applied by the Supreme Court in *Halliday* v. *United States,* 394 U.S. 831 (1969), wherein *McCarthy* v. *United States, supra,* the seminal case in this area, was held to be prospective. In each of these cases the courts applied a three-pronged test, weighing: "(1) the purpose of the new rule, (2) the extent of reliance upon the old rule; and (3) the effect retroactivity would have upon the administration of justice." *Halliday* v. *United States, supra,* at 832. The conclusion reached in each case was that retroactive application of Rule 11 decisions would adversely affect the administration of justice with little corresponding advantage to the defendant. Since a defendant would, in any event, be entitled to a vacation of his plea if he could establish the plea was involuntary, imposition of the strict compliance requirement of Rule 11 was held to be prospective only. See also *United States* v. *Kaylor,* 491 F.2d 1133, 1138 (2d Cir. 1974), vacated on other grounds — U.S. —, 94 Sup. Ct. 3201 (1974); *George* v. *United States,* 421 F.2d 128 (2d Cir. 1970).

In *Korenfeld,* this Court added an additional rationale for prospective application of Rule 11 decisions which is based upon the nature of the Federal Rules, stating:

> "The Federal Rules of Criminal Procedure are designed to operate prospectively. One of the advantages of making procedural changes by the rule-making power is that such changes can be made prospectively and without upsetting prior justified reliance on old judicial practices. Long before new rules become effective they are circulated through the legal community and judges and attorneys become aware that from a certain date in the future they will have to modify their practices. . . . It would be altogether contrary to the spirit of the rules if

> rules, or the interpretation of the rules by the courts, were held to be retrospectively applicable to cases which had been disposed of when different practices were accepted. (451 F.2d at 774)

Appellant offers no reason for a departure from this established precedent that Rule 11 cases will be applied prospectively. The purpose of the *Michel* decision, as the Court in *Korenfeld* said of the *Bye* case, "is to provide additional insurance that a defendant makes an informed decision about the consequences of his tendering a plea. . . . Increased knowledge about the consequences of a plea enhances the likelihood that the plea will be 'voluntary and knowing'." *Korenfeld* v. *United States, supra,* 451 F.2d at 774. Like *McCarthy* and *Bye, Michel* should be applied prospectively. Accordingly, Judge Judd was not required to make specific inquiry as to appellant's understanding of the special parole provisions of Section 846 before accepting appellant's guilty plea on June 25, 1973.

Absent the retroactive application of *Michel,* the appellant would be entitled to the requested relief only after showing that his plea was not voluntarily made. If he could show both that he was unaware of the mandatory special parole provisions, and that he would not have pleaded guilty had he known of them, then "he will have sustained his burden of proving that the plea was not given 'voluntarily after proper advice and with full understanding of the consequences' *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927)." *Korenfeld* v. *United States, supra,* at 775. However, bare allegations will not suffice to require an evidentiary hearing on this issue.* Minimally, the

---

* See *Sanders* v. *United States,* 373 U.S. 1, 6, 15 (1963); and *Dalli* v. *United States,* 491 F.2d 758, 760 (2d Cir. 1974) to the effect that a Section 2255 petition is properly denied without a hearing, where "the files and records of the case conclusively show that the appellant is entitled to no relief."

defendant alleging involuntariness should produce an affidavit from his attorney in support of his claim before the District Court is required to hold a hearing. See *Korenfeld, supra; United States* v. *Welton,* 439 F.2d 824, 826 (2d Cir. 1971).

In the instant case, the appellant's Section 2255 petition was based upon the bare allegation that he was not "directly" informed by the District Court of the mandatory special parole provisions of Section 846. Appellant's affidavit and memorandum in support of his petition do not allege, however, that appellant was actually unaware of the special parole provisions at the time of his plea. Nor is the petition supported by an affidavit from appellant's counsel, Jeffrey C. Hoffman, Esq., to the effect that he failed to advise appellant of that consequence prior to his plea. Rather, since it appears from the minutes of the June 25, 1973 pleadings that appellant was in the courtroom at the time his co-defendant Long was advised of the mandatory special parole term, appellant's sole complaint is that he was not *"directly"* informed of the special parole term.

Judge Judd's denial of appellant's petition was further supported by circumstances occurring after appellant's plea. Prior to being sentenced by Judge Judd, appellant was sentenced by Judge Bonsal to a prison term and a special parole term in connection with his conviction in the Southern District. Following the sentencing by Judge Bonsal appellant took no steps under Rule 32(d) to withdraw his plea in the Eastern District. Moreover, at the time of his sentencing by Judge Judd, appellant stood mute as the Court imposed a ten year special parole term.

Based upon all of these factors, it is respectfully submitted that the District Court properly denied appellant's Section 2255 petition without a hearing.

CONCLUSION

The order of the District Court should be affirmed.

Dated: March 28, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RICHARD W. BREWSTER,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1975— 614—248—94

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

EVELYN COHEN being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 28th day of March 1975 he served a copy of the within

Brief

by placing the same in a properly postpaid franked envelope addressed to:

Phyllis Skloot Bamberger, Esq.
The Legal Aid Society
United States Courthouse
Foley Square
New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Evelyn Cohen

Sworn to before me this
28th day of March, 1975

Notary Public, State of New York
No. 24-0883705
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976